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13 COURTHOUSE NEWS SERVICE

14
15 IN THE UNITED STATES DISTRICT COURT
16 FOR THE CENTRAL DISTRICT OF CALIFORNIA
17 SOUTHERN DIVISION

18 Courthouse News Service,

19 Plaintiff,

20 v.

21 David Yamasaki, in his official capacity
22 as Court Executive Officer/Clerk of the
23 Orange County Superior Court.

24 Defendant.

CASE NO. 8:17-CV-00126-AG (KESx)

**[PROPOSED] ORDER GRANTING
MOTION FOR PRELIMINARY
INJUNCTION OF PLAINTIFF
COURTHOUSE NEWS SERVICE**

Date: February 27, 2017
Time: 10:00 a.m.
Courtroom: 10D, Santa Ana Division
Judge: Hon. Andrew J. Guilford

1 The Motion of Plaintiff Courthouse News Service (“CNS”) for a preliminary
 2 injunction against Defendant David Yamasaki, in his official capacity as Court
 3 Executive Officer/Clerk of the Orange County Superior Court, came on for hearing on
 4 February 27, 2017. After full consideration of the arguments of counsel and the
 5 papers and evidence presented, the Court hereby ORDERS as follows:

6 (1) CNS’s motion for a preliminary injunction is GRANTED.

7 (2) To be entitled to a preliminary injunction, a plaintiff must demonstrate
 8 (a) a likelihood of success on the merits; (b) that plaintiff is likely to suffer irreparable
 9 injury in the absence of injunctive relief; (c) the balance of equities tips in plaintiff’s
 10 favor; and (d) an injunction is in the public interest. *Winter v. Nat. Res. Def. Council*,
 11 555 U.S. 7, 20 (2008). For the reasons noted below, CNS has clearly met this
 12 standard, and thus the Court need not address the alternative standard for obtaining a
 13 preliminary injunction.

14 (a) To prevail on its single claim for relief, under 42 U.S.C. § 1983,
 15 CNS must prove that conduct by a person acting under color of state law proximately
 16 caused a violation of CNS’s First Amendment right of access. *Crompton v. Gates*,
 17 947 F.2d 1418, 1420 (9th Cir. 1991). The Court finds that Defendant was acting in
 18 his official capacity under color of state law when he implemented and/or enforced a
 19 policy, custom or longstanding practice of denying timely access to new complaints
 20 promptly upon their receipt by OSC for filing by refusing to make newly filed civil
 21 unlimited complaints available to the public and press until after such complaints are
 22 “processed,” including but not limited to refusing to provide timely access to new
 23 unlimited civil complaints processed or received for filing after 4 p.m., which
 24 pursuant to OSC local rules are given a filing date as of the date of receipt as long as
 25 they are filed before midnight on court days.

26 (b) As the Ninth Circuit has held, “the First Amendment right of
 27 access ... extends to civil proceedings and associated records and documents,”
 28 *Courthouse News Serv. v. Planet* 750 F.3d 776, 787-88 (9th Cir. 2014) (“*Planet I*”),

1 which includes a right of “timely access to newly filed complaints.” *Id.* at 788; *see*
 2 *Courthouse News Serv. v. Planet*, 2016 WL 4157210, *12 (C.D. Cal. 2016) (“*Planet*
 3 *III*”); *Doe v. JFB RAK LLC*, 2014 U.S. Dist. LEXIS 98688, *16 (D. Nev. July 18,
 4 2014) (noting “Ninth Circuit’s recognition of a qualified First Amendment right of
 5 access to newly filed complaints”); *see also, e.g., Bernstein v. Bernstein Litowitz*
 6 *Berger & Grossmann LLP*, 814 F.3d 132, 136 (2d Cir. 2016) (“complaint is a judicial
 7 document subject to a presumption of public access under the First Amendment and
 8 the common law”).

9 (c) As *Planet III* held in granting in part CNS’s motion for preliminary
 10 injunction and denying the clerk’s motion, the qualified First Amendment right of
 11 access to civil complaints “arises when a complaint is received by a court, rather than
 12 after it is ‘processed.’” *Planet III*, 2016 WL 4157210 at *13. Moreover, “[t]his
 13 qualified right of timely access attaches on receipt regardless of whether courts use
 14 paper filing or e-filing systems.” *Courthouse News Serv. v. Planet*, 2016 WL
 15 4157354, *1 (C.D. Cal. June 14, 2016) (Judgment for Declaratory Relief and
 16 Permanent Injunction); *accord Courthouse News Serv. v. Jackson*, 2009 WL 2163609,
 17 *4 (S.D. Tex. July 20, 2009) (entering preliminary injunction after rejecting a Houston
 18 court clerk’s contention that delaying access to new paper and e-filed petitions until
 19 after clerical processing was not the “‘functional equivalent’ of an access denial” and
 20 was “thus unconstitutional”); *Courthouse News Serv. v. Tingling*, 16 Civ. 8742 (ER),
 21 Trans. of Order Granting Prelim. Inj. (“*Tingling Order*”) at 46 (S.D.N.Y. Dec. 16,
 22 2016) (entering preliminary injunction after finding that New York County Clerk
 23 “may not prevent the press from accessing” newly filed complaints at New York
 24 Supreme Court “because of its review and logging procedures.”).

25 (d) This conclusion is confirmed by analysis of the twin pillars of a
 26 First Amendment right of access – “‘experience and logic.’” *Planet III*, 2016 WL
 27 4157210 at *8 (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986)
 28 (“*Press-Enterprise II*”). The evidence submitted by CNS, including the declarations

1 from CNS reporters and editors around the country in the *Planet* case, attest to a
 2 history of timely access once complaints are received for filing.¹ Those declarations
 3 are also supported by the Declaration of William Girdner in this case and by numerous
 4 cases recognizing complaints are public documents once they are received for filing.
 5 As in *Planet III*, this Court also finds that “[l]ogic likewise demands that the qualified
 6 right of timely access must arise the moment a complaint is received by the court,
 7 rather than after ‘processing’ is completed,” since Defendant cannot “meaningfully
 8 dispute that timing is a critical element of a story’s newsworthiness.” 2016 WL
 9 4157210 at *13. Indeed, “it would be nonsensical for a qualified right of access to
 10 arise only after a complaint has been ‘processed,’ for such a rule would run contrary to
 11 the text of and purpose underlying” the rules of court, including Rule of Court
 12 1.20(a), which requires that complaints be “‘deemed filed on the date [they are]
 13 received by the court clerk,’” *id.*, as well as local rules relevant to this case, such as
 14 OSC Local Rule 352, which provides that “[e]lectronically filed document filed prior
 15 to midnight on a court day will be deemed filed as of that day.”

16 (e) As was the case with the clerks in the *Jackson*, *Planet*, and
 17 *Tingling* cases, CNS has presented evidence showing that Defendant is denying access
 18 to newly filed complaints until after processing, in violation of the First Amendment
 19 right of timely access to new complaints upon their receipt by OSC. CNS presented
 20 evidence based on OSC’s own records demonstrating that access to nearly half of the
 21 new complaints received by OSC during the last three months of 2016 was delayed for
 22 between one and nine court days. These delays primarily result from Defendant’s
 23

24 ¹ The Court grants CNS’s request that it take judicial notice of the declarations filed in
 25 the *Planet* case, including but not limited to those cited in the *Planet III* ruling, and
 26 treats those declarations as if they had been filed in this case. *See, e.g., Harris v.*
 27 *County of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012); *Kinnett Dairies, Inc. v.*
 28 *Farrow*, 580 F.2d 1260, 1277 n.33 (5th Cir. 1978); *see also Ellingson v. Burlington*
N., Inc., 653 F.2d 1327, 1330 (9th Cir. 1981), superseded by rule on other grounds as
 stated in, *PAE Gov’t Servs., Inc. v. MPRI, Inc.*, 514 F.3d 856, 859 n.3 (9th Cir. 2007).

1 practice of denying access until after processing. In addition, as in *Planet* and
 2 *Tingling*, Defendant continues to accept new complaints for filing even after access to
 3 view those complaints at the courthouse is terminated for the day. Although
 4 Defendant provides online access to some of those complaints through its web site,
 5 the court finds such access inadequate because (1) it only provides access to those
 6 complaints Defendant and his staff process before the clerk's office closes for the day
 7 and (2) the fees charged by Defendant to view court records on its web site are
 8 prohibitive, at least for any member of the press or public seeking to review more than
 9 a small handful of new filings.

10 (f) While CNS has “the general burden of establishing the elements
 11 necessary to obtain injunctive relief,” it is “the [government that] has the burden of
 12 justifying the restriction” imposed on the First Amendment right of access. *Klein v.*
 13 *City of Laguna Beach*, 381 Fed. App'x 723, 725 (9th Cir. 2010) (quoting *Klein v. City*
 14 *of San Clemente*, 584 F.3d 1196, 1201 (9th Cir. 2009)). To do so, OSC must
 15 “overcome” the right of timely access by showing that denying access until after
 16 processing is necessary to protect “an ‘overriding [governmental] interest based on
 17 findings that closure is essential to preserve higher values.’” *Planet I*, 750 F.3d at 793
 18 n.9. Alternatively, Defendant can attempt to argue that its “delay in making the
 19 complaints available [are] ... analogous to a permissible ‘reasonable restriction[] on
 20 the time, place, or manner of protected speech.’” *Id.* Defendant has not met his
 21 burden as to either.

22 (g) Defendant has not demonstrated an overriding interest for which it
 23 is “essential” to deny access until after processing, or to deny access to late-filed
 24 cases. Moreover, as in *Jackson*, *Planet* and *Yamasaki*, OSC has a “variety of simple
 25 measures” available for providing timely access prior to processing. *Planet I*, 750
 26 F.3d at 791. For example, Defendant's predecessor conceded there is no
 27 technological reason why OSC could not allow access to the electronic in-box of
 28 newly filed complaints, in the same manner that other courts do and the New York

County Clerk is doing to comply with the preliminary injunction issued in *Tingling*, Status Conf. RT 3 (Jan. 12, 2017) (“What [defendant] expects to do ... [is] to have the ... E-filing system modified to permit the immediate public online viewing of case initiating electronic filings in New York County including new complaints without prior ... staff review.”) . Alternatively, complaints can easily be made available on the computer terminals – on which they can currently be viewed at the courthouse – upon receipt and before they are administratively processed, and terminals could be put in a press room or other spaces where reporters can work after the court closes for the day.

(h) Defendant’s policies and practices also cannot be upheld as a reasonable time, place and manner restriction. To be valid, Defendant “must demonstrate” that the restriction is “‘narrowly tailored to serve a significant governmental interest, and ... leave[s] open ample alternative channels for communication of the information.’” *Planet III*, 2016 WL 4157210 at *8 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Defendant cannot carry his burden of demonstrating that denying access until after processing is “narrowly tailored” for the reasons noted above. In addition, he cannot demonstrate his policies leave open ample alternative channels for communication of information about newly filed complaints. The Ninth Circuit has held that “[t]o comport with the First Amendment, a permitting ordinance must provide some alternative for expression concerning fast-breaking events.” *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1047 (9th Cir. 2006). “Under [O]SC’s processing policy, however, a CNS reporter interested in seeing a newly filed complaint that they consider ‘newsworthy’ would be subject to the whims and turnaround times of [Defendant] and his inferiors, who could reject such access on the departmental policy that a complaint is not a ‘public record’ until it is ‘processed.’” *Planet III*, 2016 WL 4157210 at *19.

1 (i) For the reasons set out above, CNS has shown a likelihood of
2 success on the merits.

3 (j) In addition, “CNS would be irreparably harmed without the
4 injunctive relief” because “the loss of First Amendment freedoms even for minimal
5 periods of time unquestionably constitute irreparable injury.” *Tingling* Order at 52-53
6 (quoting *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 127 (2d Cir. 2006))
7 (further quotations omitted); *accord, e.g., Jacobsen v. U.S. Postal Service*, 812 F.2d
8 1151, 1154 (9th Cir. 1987); *Jackson*, 2009 WL 2163609 at *4.

9 (k) The balance of equities also supports an injunction. “The vital
10 public interest in preserving the media’s ability to monitor the government’s
11 activities” outweighs any limited harm to Defendant, who as noted, “has available a
12 variety of simple measures to comply with an injunction granting CNS ... the relief
13 requested.” *Planet III*, 2016 WL 4157210 at *13; *accord, e.g., Tingling* Order at 53;
14 *Jackson*, 2009 WL 2163609 at *5; *see also Planet I*, 750 F.3d at 788-89 & 791.

15 (l) In addition, “injunctive relief would serve the public interest.
16 There is, of course, an important First Amendment interest in providing timely access
17 to new case-initiating documents.” *Tingling* Order at 53; *accord Planet III*, 2016 WL
18 4157210 at *13; *Jackson*, 2009 WL 2163609 at *5.

19 (3) Accordingly, Defendant David Yamasaki, in his official capacity as
20 Court Executive Officer and Clerk of the Superior Court of California, County of
21 Orange, and his agents, employees and all persons acting at his direction, shall be
22 enjoined preliminarily, during the pendency of this action, from refusing to make
23 newly filed civil unlimited complaints available to the public and press until after such
24 complaints are “processed,” and from refusing to provide timely access to new
25 unlimited civil complaints processed or received for filing after 4 p.m., which
26 pursuant to OSC local rules are given a filing date as of the date of receipt as long as
27 they are filed before midnight on court days. Defendant is further directed to make
28 such complaints accessible to the public and press in a timely manner from the

1 moment they are received by the court. The foregoing relief is not sought in those
2 instances where the filing party has properly moved to place the complaint under seal.
3 In light of the nature of this case and the relief granted, bond under Federal Rule of
4 Civil Procedure 65(c) is waived. *Jorgensen v. Cassiday*, 320 F.3d 906, 919 (9th Cir.
5 2003).

6 IT IS SO ORDERED.

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8 Dated:

9 Hon. Andrew J. Guilford
10 Judge of the U.S. District Court
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